

STATE OF MICHIGAN
COURT OF APPEALS

AMY J. KWIATEK,

UNPUBLISHED
November 24, 1998

Plaintiff-Appellee,

v

No. 202116
Oakland Circuit Court
LC No. 95-498942 DM

RONALD H. KWIATEK,

Defendant-Appellant.

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right the property distribution provisions of the judgment of divorce entered by the trial court. We affirm.

Plaintiff filed for divorce in June 1995, after nine years of marriage. In granting the divorce, the trial court found fault on the part of defendant for the failure of the marriage, citing his substantial expenditures of money to support his cocaine addiction, extra-marital relationships, and the impact of those behaviors on the household. After determining the assets that comprised the marital estate, the court divided the estate and awarded approximately sixty percent to plaintiff based on the totality of the circumstances of the case.

On appeal, defendant first argues the trial court erred in determining that a \$255,000 personal injury settlement that the couple received in 1994 was a marital asset and dividing it between the parties. When reviewing a trial court's decision regarding property division in a divorce case, this Court first reviews the trial court's findings of fact under the clearly erroneous standard. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A finding is clearly erroneous if a review of the entire record leaves this Court with the definite and firm conviction that a mistake has been made. *Id.* If the trial court's factual findings are upheld, this Court considers whether the court's dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is within the trial court's discretion and will be affirmed unless this Court is convinced that the division is inequitable. *Sparks, supra* at 151-152; *Draggoo, supra* at 429-430.

Defendant was in a car accident in 1992 for which he brought a personal injury claim. Plaintiff brought a claim for loss of consortium. The check for the proceeds was made payable to both parties, without any indication of what portion was for defendant's injuries and what portion for plaintiff's loss of consortium claim. However, there was uncontroverted testimony that none of the award was for lost wages. The court concluded that the personal injury settlement proceeds were a marital asset because the check was made out to both parties and the parties treated the proceeds as a marital asset. Much of it was used for the mutual benefit of the parties to pay for vacations and home repairs, and a significant amount was invested in both parties' names. Defendant argues that because the award was for pain and suffering, and he was the only party who endured the pain and suffering, and because he made all the decisions with regard to how the money would be spent, the personal injury award was his alone and not part of the marital estate. We disagree.

This Court has held that the personal injury action of one spouse, to the extent it represents pain and suffering rather than lost wages, is not marital property. *Lee v Lee*, 191 Mich App 73, 79; 477 NW2d 429 (1991); *Bywater v Bywater*, 128 Mich App 396, 397-398; 340 NW2d 102 (1983). However, in those cases the spouses filed suit alone, and here plaintiff's loss of consortium claim was part of the personal injury lawsuit. See *Wilson v Wilson*, 179 Mich App 519, 521, 524; 446 NW2d 496 (1989). Moreover, in this case, the settlement check was made payable to both parties and the parties treated the settlement as marital property. Under these circumstances, we believe the trial court properly considered the settlement to be marital property.

Moreover, we are not convinced that the trial court's disposition of that asset with the rest of the marital estate was inequitable. The goal in apportioning marital assets in a divorce proceeding is to reach an equitable property division in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departure from congruence must be clearly accounted for by the court. *Id.* at 114-115. The factors to be considered when dividing a marital estate include the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance. *Id.* at 115. The factors need not be given equal weight where the circumstances indicate otherwise. *Id.*

The parties' marriage lasted nine years. Both parties worked throughout the marriage. Although plaintiff's income was greater than defendant's for the most recent years, plaintiff showed at trial that the expense of maintaining a household for her and her child exceeded her income. Defendant has, in the past, earned more than plaintiff, and admitted at trial that his cocaine addiction had a negative impact on his recent earning capacity. However, defendant asserted at trial that he is now recovering. Both parties have experienced health problems. Finally, we find no error in the trial court's determination that defendant's cocaine addiction caused the failure of the marriage. That finding was amply supported by the evidence. In view of these circumstances, we do not find the sixty-forty division of property to be inequitable.

Defendant also argues the trial court erred in including the gross amount of his profit-sharing/401K plan, including the premarital portion, in the marital estate, while including only the portion of plaintiff's pension earned during the marriage, as testified to by an expert witness. Defendant

attributes the discrepancy in method of calculation to the fact that the court did not have documentation that he claims to have supplied to the court, verifying the marital portion of his profit-sharing/401K plan. However, upon learning that the court did not have the document at trial, defendant did not supply the court with a copy or provide any other testimony, other than defendant's uncertain estimate, as to the marital portion of defendant's asset. When defendant brought the alleged error to the attention of the court in its motion for reconsideration, the court declined to amend its judgment, stating that it was satisfied that the division of property was equitable, based on the totality of the circumstances.

Pension benefits are marital assets subject to distribution in the discretion of the court. *Boonstra v Boonstra*, 209 Mich App 558, 563; 531 NW2d 777 (1995). While those pension benefits accumulated during a marriage are always considered marital assets, MCL 552.18(1); MSA 25.98(1); *Boonstra, supra* at 562, those benefits acquired prior to a marriage may also properly be distributed at the discretion of the court. *Id.* at 562-563. Given that the trial court in this case heard no expert testimony and possessed no documentation verifying the marital portion of defendant's profit-sharing plan, we find no error in the court's valuation of the plan in its gross amount, and its distribution to defendant as part of his portion of the marital estate.

Next, defendant argues the trial court erred in finding that he dissipated \$60,000 in marital assets. While the trial court determined that \$60,000 of the personal injury settlement proceeds were unaccounted for and found that defendant had spent the money on his cocaine habit, defendant contends that he spent the money maintaining his vending machine business. However, defendant provided no receipts or other documentation to support his assertions. After hearing testimony from both parties, the trial court apparently credited plaintiff's testimony over defendant's. This Court accords significant deference to a trial court's findings when they are based on the credibility of witnesses. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). We find no error in the court's determination that defendant dissipated marital assets.

Finally, defendant argues the trial court erred in failing to amend its judgment to reflect a \$4,000 credit to him. The court awarded plaintiff \$4,000 of what it believed to be the \$14,000 remaining assets of defendant's failed vending business, stating that the amount would be credited toward the debts that defendant owed to plaintiff. Although the credit was not documented in the judgment of divorce, this Court learned at oral argument that the trial court entered a subsequent order addressing the issue. Accordingly, we need not discuss defendant's argument.

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

Doctoroff, J. did not participate.